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No. 08-1174

# In the Supreme Court of the United States

SUSAN B. HERSH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The question presented is whether Section 526(a)(4), construed with due regard for principles of constitutional avoidance, violates the First Amendment.

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 553 F.3d 743. The memorandum opinion and order of the district court denying in part the government's motion to dismiss (Pet. App. 61-78) is reported at 347 B.R. 19.

### JURISDICTION

The judgment of the court of appeals was entered on December 18, 2008. The petition for a writ of certiorari was filed on March 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. This case concerns 11 U.S.C. 526(a)(4), a provision of the Bankruptcy Code that regulates paid bankruptcy advice. Congress enacted Section 526(a)(4) as

part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Report as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the BAPCPA both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions, and that such practices had sometimes jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The BAPCPA added or strengthened several restrictions on bankruptcy professionals' conduct. Those restrictions are intended to protect the clients and prospective clients of bankruptcy professionals, the credi-

tors of clients who do enter bankruptcy, and the bankruptcy system. The pertinent provisions require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system. See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D). Many of the BAPCPA's requirements and prohibitions apply equally to bankruptcy attorneys, to bankruptcy petition preparers who are not attorneys, and to all other professionals who provide bankruptcy assistance to consumer debtors for a fee; those professionals are collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A).[1]

Section 526 sets out four basic rules of professional conduct for debt relief agencies. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision that is directly at issue here, states:

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[1] The term "bankruptcy assistance" is defined to include providing an "assisted person" with advice, counsel (including "legal representation"), or document preparation or filing assistance "with respect to a case or proceeding under" the Bankruptcy Code. 11 U.S.C. 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts" and whose nonexempt property is worth less than a specified, inflation-adjusted amount, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. 526(a)(4).

The principal remedy for violations of Section 526 is a civil action by the debtor to recover the debtor's "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). The statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). The bankruptcy court may also impose an injunction or an "appropriate civil penalty" for intentional or recurring violations, either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Petitioner is an attorney who advises consumer debtors about bankruptcy. Pet. App. 2-3. She filed this action against the United States to challenge the application of several BAPCPA provisions that regulate debt relief agencies' professional conduct, including the advice limitation in Section 526(a)(4). Petitioner contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute even if they provide bankruptcy-related advice to debtors. She also argued that, to the extent the statute encompasses licensed attorneys, Section 526(a)(4) and other provisions of the BAPCPA violate the First Amendment. Pet. App. 4.

The district court denied the government's motion to dismiss the challenge to Section 526(a)(4), Pet. App. 61-

78; granted summary judgment for petitioner on that claim, *id.* at 59; and permanently enjoined enforcement of Section 526(a)(4), *id.* at 57, 60. Although the district court agreed with the government that an attorney may be a debt relief agency, *id.* at 66, the court held that Section 526(a)(4) is facially unconstitutional because it is "overinclusive," *id.* at 70; see *id.* at 66-70.

3. The court of appeals reversed in relevant part and upheld Section 526(a)(4) as facially constitutional. Pet. App. 1-56. The court also concluded that attorneys may fall within the statutory definition of "debt relief agency." *Id.* at 9-15.

a. The court of appeals concluded that Section 526(a)(4) can be construed in a way that both avoids any constitutional difficulty and focuses directly on Congress's acknowledged purpose in enacting it, *i.e.*, preventing attorneys from encouraging their clients to "load up" on debt to abuse the bankruptcy system. Pet. App. 30-38. The court noted that the term "in contemplation of bankruptcy" is often used as a term of art that connotes an intent to abuse the bankruptcy system. *Id.* at 30-31 (citing *Black's Law Dictionary* 336 (8th ed. 2004)). Indeed, a few years before Congress enacted the BAPCPA, the Fifth Circuit itself had described the abusive practice of "incurring card debt in contemplation of bankruptcy" with the term "loading up." *Id.* at 31 (quoting *AT&T Universal Card Servs.* v. *Mercer (In re Mercer)*, 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc)). And the court noted numerous other American and English authorities supporting such a construction of the phrase "in contemplation of" in the bankruptcy context. *Id.* at 31 n.17 (citing *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 541 F.3d 785, 799-800 (8th Cir. 2008) (*Milavetz*) (Colloton, J., concurring in part and dissent-

ing in part), petition for cert. pending, No. 08-1225 (filed Apr. 3, 2009).

The court of appeals further explained that the structure of Section 526 supports the specialized interpretation described above. Pet. App. 32-34, 37-38. The court pointed out that violations of Section 526 may be remedied by awarding the debtor actual damages, which strongly suggests that the practices banned are practices that would actually harm the debtor. See *id.* at 34. The court further noted that Section 526(a)(4) was enacted alongside, and placed together with, "three other rules of professional conduct designed to protect debtors." *Id.* at 37-38 (citing 11 U.S.C. 526(a)(1)-(3)).

The court of appeals also observed that the legislative history and purpose of the BAPCPA supported the court's construction of Section 526(a)(4). Pet. App. 35-36. The court explained that numerous elements of the BAPCPA were demonstrably "intended to curb abuse," which the court took as further evidence that "as part of this plan, section 526(a)(4) is only meant to curb abusive practices." *Id.* at 36.

b. The court of appeals also explained that, even if its reading of Section 526(a)(4) were not the most natural interpretation of the statute, that reading would be compelled by the doctrine of constitutional avoidance. The court identified several cases in which this Court had adopted an arguably countertextual construction in order to avoid constitutional difficulties. Pet. App. 26-30 (citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001); *Boos* v. *Barry*, 485 U.S. 312 (1988); and *United States* v. *Witkovich*, 353 U.S. 194 (1957)). The court noted that the avoidance doctrine may even require giving "[a] restrictive meaning [to] what appear to be plain words." *Id.* at

26 (quoting *Witkovich*, 353 U.S. at 199) (first brackets in original).

Petitioner had argued that the text of Section 526(a)(4) is so unambiguous that no narrowing construction is possible. See Pet. App. 20. The court of appeals concluded, however, that "the language of [the statute] can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Id.* at 38; see *id.* at 26. The court explained that, on that reading, "[S]ection 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system." *Id.* at 38.

c. The court of appeals concluded that, if Section 526(a)(4) is construed in this manner, it is not facially unconstitutional. The court explained that a statute is not unconstitutionally overbroad unless the "overbreadth is substantial in relation to the statute's legitimate reach." Pet. App. 40 (citing *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)). Petitioner did not dispute that Congress could validly regulate the sort of advice to engage in abusive conduct that all parties agreed was covered by Section 526(a)(4). See *id.* at 21-26.[2] And under the court's narrowing construction, Sec-

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[2] The court noted various contexts in which the First Amendment permits Congress and the States to regulate that sort of unethical attorney advice. For instance, the First Amendment does not protect speech proposing an illegal transaction, and abusive accumulation of debt may amount to fraud or theft. See Pet. App. 23-24 (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)). Further, the government has a sufficiently important interest in the judicial process, including the bankruptcy system, to

tion 526(a)(4) did not apply to *any* of petitioner's examples of speech that could not constitutionally be prohibited. *Id.* at 41.[3] Accordingly, the Fifth Circuit found it "clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach." *Id.* at 43.

d. The court of appeals acknowledged that a divided panel of the Eighth Circuit had reached the opposite conclusion on the same issues and had invalidated Section 526(a)(4) as applied to attorneys. Pet. App. 16-17 (citing *Milavetz, supra*). On that issue, the court stated, it "agree[d] with Judge Colloton's dissenting opinion" in the Eighth Circuit case. *Id.* at 10 n.6.

**DISCUSSION**

The government has filed its own petition for a writ of certiorari seeking review of the Eighth Circuit's decision invalidating Section 526(a)(4). Pet. at I, *United States* v. *Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (filed Apr. 3, 2009). As that petition explains, the conflict between the Fifth and Eighth Circuits over the con-

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justify regulation of attorneys' unethical conduct affecting that process. See *id.* at 24-26 (citing *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), and Model Rules of Prof'l Conduct R. 1.2(d)). The court explained that the abusive accumulation of debt in contemplation of bankruptcy "is akin to committing a fraudulent act," and therefore "Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to [commit such an act]." *Id.* at 26.

[3] Petitioner had contended, and the district court agreed, that Section 526(a)(4) could not validly regulate advice to take on prebankruptcy debt under legitimate circumstances, such as advice to refinance a loan. Pet. App. 18, 69.

stitutionality of an Act of Congress warrants this Court's review.[4]

In the government's view, *Milavetz* provides the better vehicle to resolve the circuit conflict, and the petition in this case should therefore be held pending the disposition of *Milavetz*. The disagreement between the Fifth and Eighth Circuits as to the constitutionality of Section 526(a)(4) is rooted in those courts' divergent views on a statutory-interpretation issue that petitioner does not include in her questions presented. The government construes Section 526(a)(4) to regulate *only* advice to incur debt with the intention to abuse the bankruptcy system. The Eighth Circuit rejected that interpretation and, as a result, held that the statute is unconstitutionally overbroad. The court below adopted the narrowing construction and sustained the statute against petitioner's overbreadth challenge. Although the court below found that interpretive issue to be dispositive of the case, petitioner does not squarely address it.[5]

Instead of addressing the statutory question, petitioner presents two issues on which no circuit conflict

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[4] The government is providing petitioner's counsel with a copy of the government's petition for a writ of certiorari in *Milavetz*.

[5] To be sure, "granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 56 (2006); see *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008) (explaining that "[t]he first step in overbreadth analysis is to construe the challenged statute"). If the Court were to grant review in this case, it accordingly would have discretion to consider the proper interpretation of Section 526(a)(4) as a logical antecedent to the constitutional questions that petitioner presents. It would nevertheless be preferable to resolve the circuit conflict in a case where the petitioner has expressly sought this Court's review on the relevant interpretive question.

exists. First, petitioner appears to contend that Section 526(a)(4) is invalid even if it is given the narrowing construction adopted by the court of appeals in this case. See Pet. 14-15. No court has adopted that position. The Eighth Circuit concluded that the statute was unconstitutionally overbroad as applied to attorneys because that court construed the statute to extend to "appropriate and beneficial advice." *Milavetz*, 541 F.3d at 793. The Eighth Circuit majority did not dispute Judge Colloton's conclusion that the statute would be constitutional if a narrowing construction were adopted. See *id.* at 799 (Colloton, J., concurring in part and dissenting in part). And whereas the Eighth Circuit concluded only that Section 526(a)(4), capaciously construed, was overbroad *in relation to its legitimate sweep*, see 541 F.3d at 794 & n.10, petitioner appears to argue that Section 526(a)(4) has no legitimate application at all.

Second, petitioner contends that this Court should grant certiorari to decide what standard governs a First Amendment challenge to an ethical regulation on attorneys' conduct. See Pet. 12-14. Petitioner urges this Court to apply strict scrutiny, rather than the more deferential standard that the Court applied to attorneys' litigation conduct in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). But the court below did not resolve that issue, see Pet. 13; nor did either the district court in this case or the Eighth Circuit in *Milavetz*, both of which stated that the overbreadth analysis would yield the same result under either strict scrutiny or the *Gentile* standard. See Pet. App. 17-18; *Milavetz*, 541 F.3d at 793.

The government's petition in *Milavetz* presents both the statutory and constitutional questions on which a circuit conflict exists. Depending on the manner in

which it construes Section 526(a)(4), the Court in *Milavetz* might have occasion to decide whether the *Gentile* standard applies in this context. But in the absence of a circuit conflict on that question (and, indeed, without the benefit of any holding on that question by any court of appeals), the issue does not warrant plenary review by this Court in its own right.

## CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *United States* v. *Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (filed Apr. 3, 2009), and then dispose of this case accordingly.

Respectfully submitted.

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